SUPREME COURT U S

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1268

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

Petitioners,

vs.

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, the City of Chicago, Richard J. Daley, James B. Conlisk and William E. Downes, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause.

OPINION BELOW

The opinion of the Court of Appeals was handed down January 8, 1975 and has not yet been reported officially. The opinion is reproduced in the Appendix to this petition.

JURISDICTION

The Court of Appeals' judgment was entered January 8, 1975. This petition is filed within 90 days thereof. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the City of Chicago may be enjoined from enforcing, as unconstitutional, a prohibition against distributing literature and soliciting within the terminal buildings of the city-owned airport.

THE PROHIBITION INVOLVED

The City of Chicago's prohibition against leafletting and soliciting within the interior of the terminal buildings at the airport is as follows:

> "No person shall be permitted to picket, sell anything (except for authorized concessionaires or lessees, and then only at assigned spaces) distribute literature of any nature, or solicit or collect contributions within any building at any airport operated by the City of Chicago."

STATEMENT OF THE CASE

Respondents filed suit against petitioners, City of Chicago, its Mayor, the Superintendent of Police, and the Commissioner of the Department of Aviation, alleging that the City's prohibition against passing out literature within the terminal buildings of Chicago-O'Hare International Airport deprived them of constitutionally guaranteed rights. Respondents prayed for an injunction against the enforcement of the prohibition, for a declaration of its unconstitutionality and damages. The district court entered an injunction, effectively permanent, against enforcement of the prohibition. The Court of Appeals affirmed.

Respondents are members of the Chicago Area Military Project (CAMP). The objective of CAMP is to give legal and medical advice to persons in the military services. CAMP publishes a monthly newsletter (CAMP News (News of the GI Movement)) which contains news of the group's activities and legal advice of interest to persons in military service. It is distributed only to members of the armed services.

On Sunday, March 11, 1973, at approximately 5 p.m., seven members of CAMP entered the airport buildings, and in groups of two or three distributed CAMP News to persons in military uniform. This occurred both in the waiting area and in the area of the airline ticket counters. After about an hour a plain clothes policeman and subsequently a uniformed officer told two members of CAMP that leafletting was not permitted and that if they persisted they would be arrested. The two members informed the rest of the group and then all left the airport. No arrest was made. One week later at about the same time

of day, one member of the group again distributed CAMP News at the airport. After one-half hour he sighted a policeman, and believing he would be arrested for violating the prohibition against leafletting, he left the airport.

Members of CAMP did not attempt to distribute their newspaper on the sidewalk surrounding the buildings; the prohibition does not apply there.

At trial, the airport manager described the airport and conditions there. O'Hare Airport is the world's busiest. Approximately 90,000 airline passengers use the airport each day, and 20,000 persons are employed there. In addition, for every passenger using the airport, it is estimated that there are an additional 1½ persons who accompany passengers ("picker-uppers or dropper-offers"). In total each year, 100 million passengers, persons accompanying them, and employees use the airport. Less than one percent of this number is made up of persons not having airline business, principally school children and others using the observation decks.

During normal peak periods, approximately 25-35,000 persons may be in the airport buildings at any given time, and this number is larger when the airport operations are delayed.

During peak periods or when there is a delay caused by weather, every position is manned at the airline ticket and check-in counters, with as many as fifteen to twenty persons waiting in line at each position. Similarly, in front of the hijack security stations, the lines are sometimes sc full that "the passenger flow backs up into the lobby." And in the waiting areas, at peak times, the lobby is so crowded that all benches and lounges are filled and passengers sometimes are required to sit on the floor.

The manager, Mr. Dunne, was asked to describe the effect on passengers in the queues and reposing in the waiting area of persons wishing to impose their views, thrust unwanted literature into passengers' hands or solicit contributions:

> Q. "You described what you observed about the passengers in front of the ticket counters during peak periods; if a passenger was approached by a person and the passenger did not want to speak to this person, what recourse would a passenger have, waiting in line there?"
>
> Mr. Dunne: "Unless he wanted to hit him in the head, he would have to stand there and take whatever he is—paper he was passing out or enter into whatever conversation he—"
>
> The Court: "He couldn't refuse to hold his hand out and not take it? Is that what you are talking about?"
>
> The Witness: "He can do that, but he is in line and he is cornered, or he will lose his place in line."

In addition to the normal airline counters, gates, and offices, the city leases space in the airport buildings to concessionaires such as candy stores, drug stores, barber shops, valet shops, newspaper stands, and gift shops. There are also two first aid rooms (used by fifty persons per day) and a travelers aid stand. All of these facilities are intended to serve only the passengers.

The airport is removed from the center of the city. Traveling time is, at best, twenty-five to thirty minutes from downtown. Some suburban residential areas are a several-minute automobile trip from the airport. Virtually no one walks to the airport, and almost no one uses the

facilities for other than travel purposes because "no one would want to make the trip."

As for airline operations, the airport's 72 gates handle more than one hundred flights per hour during peak periods. In transferring between flights, passengers must rush between gates, carrying children and baggage, often as far as 2000-2300 feet. Of course, a person attempting to catch a connecting flight wishes to be able to move between gates unhindered.

Considering the complexity of the airport, the rushing about, the split-second timing, the often crowded conditions, and the need for anti-hijack and other security precautions, the defense witnesses believed that airport operations might be seriously disrupted if all persons who wished were free to distribute literature among the passengers using O'Hare Airport. Their testimony was unrebutted.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' JUDGMENT IS IN DIRECT CONFLICT WITH THIS COURT'S DETERMINATION IN LEHMAN v. CITY OF SHAKER HEIGHTS, WHICH INVOLVED ISSUES COMMON TO BOTH CASES.

A. The Court of Appeals' judgment and analysis in the instant opinion is in conflict with the Lehman plurality.

The issue in this case is whether the terminal buildings at municipally owned airports are a forum appropriate for First Amendment activities—a forum at which such activities may be carried on without limitation. The Court of Appeals in the present case held that the O'Hare Airport lobbies were equivalent to public thoroughfares and consequently the City was permitted no limitation upon respondents' activities there. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), on the other hand, held that a municipality could properly limit expression in a city transportation facility. This case merits review and reversal by this Court because of this direct conflict with the *Lehman* decision. Supreme Court Rule 19(1)(b). The Court of Appeals' judgment turns a place reserved for commerce and intended to serve the needs of travelers into a Hyde Park, complete with a captive audience.

The *Lehman* case and the instant case are not identical but are substantially indistinguishable in all important respects. Both involve municipally owned and operated transportation facilities, and although the *Lehman* case involved the right of citizens to display protected advertising material within and upon city-owned vehicles, the

instant case presents the question whether a city may prohibit persons from distributing, on a person-to-person basis, the same kind of materials that may be prohibited if merely displayed. Under *Lehman,* the petitioners might prohibit respondents' literature from being displayed in advertising fixtures, but the Seventh Circuit's judgment allows petitioners to pass through the queues and crowds to hand out their literature. The petitioners submit that if anything, the reasons for affirming the *Lehman* prohibition are even stronger in this case because of the personal nature of the activities. The Court of Appeals' opinion was subsequent to *Lehman,* and although the Court cited *Lehman* and attempted to distinguish it, the Court's judgment is contrary to *Lehman* and should be reversed.

No majority opinion was written in *Lehman.* However, the Court of Appeals' reasoning conflicts with the plurality opinion as well as the separate opinion of Mr. Justice Douglas. In the instant case the Court of Appeals asserted that the city-owned common areas "resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights. . . ." Appendix, p. 6a. But this Court's analysis beginning with *Marsh* v. *Alabama,* 326 U.S. 501 (1946) and continuing through *Lloyd* v. *Tanner,* 407 U.S. 551 (1972) to *Lehman* has been, not the ownership, per se, of the place sought to be declared public, but the use to which it has been put. The *Lehman* plurality expressly rejected the notion that public ownership must necessarily make any place a public forum:

> "It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of non-discretionary access to such publicly owned and controlled areas of com-

munication 'regardless of the primary purpose for which the area is dedicated.' . . .

"We disagree." 418 U.S. at 301-2.

The Court of Appeals took special note that O'Hare Airport is "open to the public." App., p. 7a. But this analysis is not that of this Court in *Lehman*. Many places which are open to the public are clearly not public forums. If the Court of Appeals' analysis were correct, government office buildings, courthouses, publicly owned art museums and hospitals would become places where unfettered picketing, leafletting or proselytizing may take place. In rejecting such a theory, the *Lehman* plurality took note that the situation it was confronted with was "different from the traditional settings where First Amendment values unalterably prevail." 418 U.S. at 302. "Here, we have no open spaces, no meeting hall, park, street corner or other public thoroughfare. Instead, the City is engaged in commerce." 418 U.S. at 303. This is consistent with the opinion in *Healy v. James*, 408 U.S. 169, that the proper analysis of limitations upon First Amendment rights must take into account the nature of the place chosen for their exercise. "[A]s Mr. Justice Fortas made clear in *Tinker* [v. *DeMoines Independent School District*, 393 U.S. 503, 506 (1969)], First Amendment rights must always be applied in light of the special characteristics of the . . . environment in the particular case." 408 U.S. at 180.

The Court of Appeals also reached its conclusion that O'Hare was a proper public forum because the buildings were used not only in connection with air travel but its areas were available for shopping, dining, or sightseeing. Although that may not be said for the *Lehman* railroad cars, that distinction is without a difference. Clearly, other publicly owned facilities, such as offices, courthouses and

museums, to name a few, have restaurants and shops open to the public, but the interior and lobbies of such places are not for that reason public forums.

It is true, as the Court of Appeals noted, that this particular case involved only seven persons at O'Hare. But that small number of persons does not indicate the true importance of the Court of Appeals' decision. The opinion affects the entire operation of O'Hare, where almost 100,000 persons transact business daily, as well as similar municipally owned facilities. The result of the opinion is that not seven, but all persons who wish, are free to enter the terminal buildings and pass among the passengers—in line, seated in waiting areas, waiting for hijack security checks, or carrying luggage through the lobby to boarding areas—and thrust themselves or their ideologies upon them. As unrebutted testimony of petitioners' witnesses at trial indicated, if all who desired were free to turn the airport terminals into a public forum, airport operations might be seriously disrupted.

B. The Court of Appeals' judgment is contrary to the Lehman separate opinion.

The alternative theory of *Lehman* presented in the separate opinion of Mr. Justice Douglas was that of privacy—that it was improper to force upon passengers who have no choice but to use the transportation facilities views and opinions the passengers have no opportunity to reject. Mr. Justice Douglas noted that Mr. Lehman, while seeking to express his views, overlooked the constitutional rights of the commuters: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of

declining to receive it." 418 U.S. at p. 307. *Cf., Packer Corp.* v. *Utah,* 285 U.S. 105 (1932).

Clearly, persons using O'Hare Airport have no escape. They have no alternatives to using O'Hare, since more than 95% of commercial flights to the Chicago area make use of the airport. Conversely, virtually no one else other than passengers and employees use the airport because, as one witness put it, "No one would want to make the trip."

The Court of Appeals' judgment now creates the opportunity for all persons to roam the airport (with the limited exception of security areas or boarding corridors) and propagandize all persons they find there. The airport is often jammed with passengers, especially at times of weather delays and at peak periods. Persons must wait in queues to receive tickets, to enter the hijack security checking areas and they fill all available seats in waiting areas. Must persons in line or in lounges be forced to give up their places in order to decline to receive the respondents' messages? Rejecting their messages is not as simple a matter as switching television channels or declining to purchase a newspaper or even of averting one's eyes. Not all proselytizing and propagandizers are as mannerly as the respondents. A person should not be required to give up his right to privacy in order to catch an airplane.

The Court of Appeals attempted to distinguish away the privacy argument of the alternative *Lehman* theory by stating that it was based "almost entirely upon" the nature of the medium involved—display advertising, "to which the passenger's eye is captive." App. p. 8a. But at O'Hare, it is not merely the passenger's eye which is captive, it is the passenger himself. As noted at trial by one of the petitioners' witnesses, a passenger "is in line and he is

cornered." He must listen or receive literature "or he will lose his place in line."

(It should be further noted that the four justices' dissent in *Lehman* did not take issue with the "public forum" analysis of the plurality or with the privacy argument of the separate opinion, but only noted that the city had no right to distinguish among the messages being displayed, since if it allowed commercial advertising it was required to permit all messages.)

CONCLUSION

The Court of Appeals' opinion permits airports and all similar publicly owned spaces, regardless of the principal use of the area, to become public forums open to all who wish to make their views known. This is contrary to *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974) and a series of prior cases. Moreover, the opinion now permits persons who have no choice but to use public facilities to become unwilling audiences for all persons who wish to proselytize and propagandize. The result is completely contrary to *Lehman.* Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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April 8, 1975

APPENDIX

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

No. 74-1475

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division — No. 73 C 758
Richard B. Austin, Judge

ARGUED NOVEMBER 6, 1974 — DECIDED JANUARY 8, 1975

Before SWYGERT, *Chief Judge,* and MARIS* and CUMMINGS, *Circuit Judges.*

MARIS, *Circuit Judge.* This is an appeal by the defendants from an order of the district court enjoining them from preventing the plaintiffs from distributing literature to servicemen and the general public in the terminal buildings at O'Hare Airport, Chicago, except as to the areas immediately leading to the arrival and departure gates.

The plaintiffs, the Chicago Area Military Project, an unincorporated nonprofit organization located in Chicago

* Of the Third Circuit, sitting by designation.

and known as CAMP, and four of its members and associates brought the suit against the defendants, the City of Chicago and the Mayor, Superintendent of Police, and Commissioner of the Department of Aviation, of the City, claiming that actions by the defendants and their agents and employees in prohibiting the plaintiffs from passing out literature within the terminal buildings at O'Hare Airport deprived them of the rights of free speech, free press, and peaceable assembly guaranteed them by the federal constitution. The plaintiffs' complaint sought an injunction restraining the defendants from further depriving them of these rights and a declaration that the defendants' practice and acts were in violation of the Constitution and that their own conduct in distributing literature was protected by the First and Fourteenth Amendments. An amended complaint was filed including a second count, claiming damages, which is not involved in this appeal.

The district court granted a temporary restraining order. Subsequently a preliminary injunction was issued which on appeal this court vacated for failure of the district court to state its findings of fact and conclusions of law as required by Rule 52(a) of the Rules of Civil Procedure and because the injunction lacked the specificity required by Rule 65(d). 492 F.2d 1246. In response to our mandate the district court thereafter stated findings of fact and conclusions of law and entered an order enjoining the defendants and their agents and employees "from obstructing plaintiffs engaged in leafletting or otherwise distributing CAMP NEWS or other literature within the terminal buildings (not to include the 'fingers' leading to the arrival and departure gates) of O'Hare Field Airport." This order has been treated by the parties as a permanent injunction and we shall so regard it. From the order granting this injunction the defendants took the appeal now before us.

It appears that the plaintiff CAMP publishes a monthly newspaper called *CAMP NEWS (News of the GI Movement)* which is primarily directed to members of the military forces but is also distributed to the general public. It

carries news of the "GI Movement", news of recent legal and political developments pertinent to military personnel and news of a general nature. One of the methods used to disseminate *CAMP News* is to hand out free copies at O'Hare Airport to individuals, particularly servicemen, who desire to receive them.

O'Hare Airport, located within the limits of the City of Chicago, is owned by the City and administered by the City's Department of Aviation. It is a two-or-three-minute drive from the nearest residential area, a thirty-minute drive from the Chicago downtown area with which it is connected by major expressways and is served by bus lines and taxicabs. Private automobiles are accommodated in massive public parking lots. Leased space in the airport terminal buildings houses numerous concessionaires including restaurants and shops of every description. Seventy-two departure gates handle more than 100 flights per hour during peak periods. Approximately 20,000 persons are employed at the airport and a total of 100,000,000 passengers, persons accompanying them, and employees, use the facility each year. The district court found as a fact that large numbers of persons in the military service use the airport, many without ever leaving the terminal buildings, merely changing flights there for other locations.

At 6:00 p.m. on Sunday, March 11, 1973 Truman Walker, an associate of CAMP, and Steve Romanowski, a member, commenced distributing *CAMP News* to servicemen in one of the O'Hare Airport terminal buildings in the general area of the check-in counters but somewhat removed from the lines of persons waiting to be served at the counters. They did not approach anyone in a line. Approximately an hour later they were told by a plain-clothes policeman and subsequently by a uniformed Chicago police officer that leafletting was not permitted and that if they persisted in their activity, they would be arrested. The two then informed five other leafletters who were distributing the newspaper in the waiting areas in other terminal buildings what had transpired and all left the air-

port. One of the plaintiffs testified that he stopped leafletting because his family responsibilities were such that he could not afford being arrested.

The municipal regulation, admittedly unwritten, which the defendants enforced against the plaintiffs had been in existence since before the opening of the present terminal buildings at O'Hare Airport. It appears that it was orally promulgated by the Director of Airports of the City prior to June 1, 1956 and, in the words of the Director, it provided in substance that

> "no person shall be permitted to picket, sell anything (except for authorized concessionaires or lessees, and they only at assigned spaces) distribute literature of any nature, or solicit or collect contributions within any building at any airport operated by the City of Chicago."

The defendants assert that this oral regulation was promulgated under the authority of sections 8.2-2 and 37-4 of the Municipal Code of the City of Chicago and of the prior ordinances codified in those sections, and that it is enforceable under section 193-1.4(b) of the Code. Section 193-1.4 is in pertinent part as follows:

> "193-1.4. A person commits trespass when he knowingly:
>
> . . .
>
> (b) Remains upon the property, or any part thereof, of another after receiving notice, either oral or written, from the owner or occupant to depart; or
>
> (c) Enters upon property open to the public, or any part thereof, and remains thereon with a malicious and mischievous intent after receiving notice, either oral or written, from the owner or occupant to depart. Any person convicted of trespass shall be fined not less than $5.00 nor more than $500.00."

However, in the view which we take of the case it becomes unnecessary for us to consider the question whether the

Municipal Code does authorize the promulgation and enforcement of such an oral regulation as the one upon which the defendants here rely.

The First Amendment to the Constitution proscribes federal action which abridges an individual's right to freedom of speech, press and assembly and it has long been settled that the Fourteenth Amendment extends these First Amendment proscriptions to state action. *DeJonge* v. *Oregon,* 1937, 299 U.S. 353. One of the primary reasons for the adoption of the First Amendment was to ensure the right to distribute copies of one's own publication in public places. *Near* v. *Minnesota,* 1931, 283 U.S. 697, 716-717; *Lovell* v. *City of Griffin,* 1938, 303 U.S. 444, 451-452. In *Schneider* v. *State,* 1939, 308 U.S. 147, 162, the Supreme Court, deciding that the evil of the littering of its streets was not a sufficiently grave reason for a city to ban all leafletting, pointed out that in such a situation the evil required to be regulated was, in fact, the act of littering not the activity of leafletting. While not contesting these basic constitutional principles, the defendants strongly urge that the terminal buildings at the O'Hare Airport, because of the limited purpose which they serve, are not public places of the kind in which unrestricted leafletting must be permitted. In considering this contention we lay aside for the moment the question whether leafletting may be restricted in those particular areas, if any, in the terminal buildings where unrestricted leafletting might substantially interfere with airport operations.

In support of their contention that the terminal buildings at O'Hare Airport are not public places where the restriction of leafletting is constitutionally prohibited the defendants make a number of arguments. They assert that public ownership of the airport is not determinative of the question of the plaintiff's protection under the First Amendment, citing *Marsh* v. *Alabama,* 1946, 326 U.S. 501. They claim that only a limited invitation is extended to the public to use the airport and that this is determinative, citing *Lloyd Corp.* v. *Tanner,* 1972, 407 U.S. 551. Alleging that its function, location, and often congested condition

make the airport an inappropriate forum for First Amendment protected expression, the defendants cite *Adderley* v. *Florida,* 1966, 385 U.S. 39, and *Lehman* v. *City of Shaker Heights,* 1974, 41 L.Ed. 2d 770. Asserting that its users represent a captive audience for leafletters, the defendants rely on *Lehman* v. *City of Shaker Heights, supra.* Finally, the defendants argue that other appropriate forums are available to the plaintiffs.

The proscriptions of the First and Fourteenth Amendments are primarily directed to governmental activity. But since O'Hare Airport is government-owned and administered, the Amendments are directly applicable to it. *Marsh* v. *Alabama, supra,* involved a privately owned "company town" and is inapplicable here except to reinforce the plaintiffs' claim to protection of their right to free speech, since the Supreme Court in that case saw fit to extend the overriding interest of the United States in freedom of speech as expressed in the Constitution even to privately owned property. *Lloyd Corp.* v. *Tanner, supra,* which merely clarified the extent of the application of the First Amendment to private property, is also inapplicable. That case involved a privately owned shopping center mall. In that case the owners were not required by the Court to permit handbilling on a controversial subject unrelated to their enterprise. The only similarity of that case to this one is the commercial nature of the airport facility. However, the plaintiffs do not here claim any right to distribute leaflets on airplanes or in other privately owned or leased places but only in the spacious, city-owned common areas which resemble those public thoroughfares which have been long recognized to be particularly appropriate places for the exercise of constitutionally protected rights to communicate ideas and information. *Hague* v. *CIO,* 1939, 307 U.S. 496, 515-516. This well-established principle has been applied to a publicly owned bus terminal in *Wolin* v. *Port of New York Authority,* 2d Cir. 1968, 392 F.2d 83, cert. den. 393 U.S. 940, and to the airport of the City of Oakland in *Kuszynski* v. *Oakland,* 9 Cir. 1973, 479 F.2d 1130.

The City's claim that the public receives a limited invitation to use O'Hare Airport for travel purposes only is not supported by the evidence nor do we think it is realistic. For the fact is that great numbers of people are freely admitted to the public areas of the terminal buildings not only in connection with air travel, but also for shopping, dining, sightseeing, or merely to satisfy their curiosity. There is no question but that the terminal buildings at O'Hare Airport, city-owned and operated, are freely available to the general public and that their wide-open public areas which perhaps 90,000 transients visit daily can accommodate seven persons peacefully distributing, in groups of twos and threes, free copies of their publication to interested persons. Indeed, although airport and airline officials testified that unrestricted leafletting and solicitation could conceivably interfere with important airport operations, the City does not contend that the activities of the plaintiffs do in fact obstruct airport traffic.

The defendants argue that not all publicly owned facilities are available for every expression of free speech and they cite *Adderley* v. *Florida, supra,* and *Lehman* v. *City of Shaker Heights, supra.* With this we, of course, agree. Thus hospitals, libraries, office buildings and prisons may call for restrictive regulations appropriate to their functions. The Supreme Court, in upholding the conviction of 32 student demonstrators on charges of trespass with malicious and mischievous intent on the premises of a county jail, stated, in distinguishing an earlier case, "Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not." *Adderley* v. *Florida, supra,* at p. 41. The public areas of the terminal buildings at O'Hare Airport are not security facilities and are open to the public.

Like the decision in *Adderley* v. *Florida, supra, Lehman* v. *City of Shaker Heights, supra,* does not purport to deal with the distribution of the printed word, the traditionally protected expression of free speech with which we are here concerned. The *Lehman* case, settling an equal

protection argument as to access to car card spaces in the vehicles of a city-owned rapid transit system, is based almost entirely upon the nature of the free-speech expression involved therein, display advertising, as to which the passenger's eye is captive. The city's policy in that case of refusing to permit political display advertising in its cars occupied by paying commuters was upheld. The case has no relevance to the present problem.

Defendants' argument that the plaintiffs have alternate forums for distributing their literature and that for this reason access to O'Hare Airport may be totally denied under the Constitution is without merit. An individual "is not to have the exercise of his liberty of expression in places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 1939, 308 U.S. 147, 163; *Amalgamated Food Employees* v. *Logan Valley Plaza,* 1968, 391 U.S. 308, 323-324; *Wolin* v. *Port of New York Authority,* 2d Cir. 1968, 392 F.2d 83, 91-92, cert. den. 393 U.S. 940.

The defendants have argued that the plaintiffs failed to establish their right to a preliminary injunction because they failed to prove that if such relief was not granted they would suffer irreparable injury during the trial. As to this it is perhaps enough to point out that the injunction now before us on this appeal has been treated by the parties as a final injunction terminating the litigation. However, we think that in any case an adequate showing of irreparable injury has been made. For the evidence indicates that the defendants, through their agents, threatened the individual plaintiffs with arrest if they persisted in asserting their First Amendment rights. Such threats undoubtedly had a chilling effect on the plaintiffs' exercise of their rights, in fact deterring them from exercising those rights. This was an adequate showing to support injunctive relief in a case of this kind. *Dombrowski* v. *Pfister,* 1965, 380 U.S. 479.

We conclude that the district court did not err in enjoining the defendants from obstructing the plaintiffs from

leafletting in the terminal buildings of O'Hare Airport. At the same time we recognize, as the district court did when it excluded the "fingers" leading to the arrival and departure gates from its injunction, that the Constitution does not prohibit all regulation of leafletting in publicly owned facilities. Regulations narrowly drawn to protect the state's substantial interests with the least possible constriction of the exercise of free speech and press have long been upheld. *Cox* v. *Louisiana,* 1965, 379 U.S. 559, 562. Thus regulations prohibiting leafletting might validly be extended from the passageways leading to the arrival and departure gates to include also leafletting at check-in counters, for example, if it should appear that such activities substantially interfere with rapid and efficient airport operations. However, it does not appear from the present record that the plaintiffs' leafletting took place at check-in counters or with people waiting at them to be checked in or that the plaintiffs intend in the future to carry on their activities at such places. It will be time enough, therefore, to consider enlarging the present exception to the general scope of the injunction in question if and when the City promulgates a suitable restrictive regulation and makes the requisite showing to the district court of the need for it.

Affirmed.

LIBRARY
SUPREME COURT, U. S.

No. 74-1268

FILED
MAY 7 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

Petitioners,

vs.

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1268

CITY OF CHICAGO, RICHARD J. DALEY, JAMES B. CONLISK and WILLIAM E. DOWNES, JR.,

Petitioners,

vs.

CHICAGO AREA MILITARY PROJECT, EMILY FRIEDMAN, STEVE ROMANOWSKI, LAWRENCE WILLBORN and LYDIA WILLBORN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the City of Chicago's total and absolute prohibition through an informal, general and oral regulation of peaceful and nondisruptive distribution of leaflets in all public areas of Chicago O'Hare International Airport open to the general public is a prohibition consistent with the First Amendment.

STATEMENT OF THE CASE

As a preface to stating the case, respondents would stress the impropriety of petitioners' statement. Petitioners attempt to relitigate the facts in this Court, offering testimony which obviously was considered by the trial court in rendering its findings—findings with which the Court of Appeals found itself in accord. Whatever room may be left for disputing the conclusions of law which the two lower courts arrived at (and respondents maintain there is none), it certainly is too late in the day to responsibly expect this Court to sit as a court of first impression to weigh and assess trial court testimony.

Respondent Chicago Area Military Project is an unincorporated, non-profit organization, known as CAMP, which publishes a monthly newsletter specifically directed to members of the military forces and distributed to them as well as to members of the general public. On March 11, 1973, two members of CAMP were distributing said newsletter at O'Hare Airport "in the general area of the check-in counters but somewhat removed from the lines of persons waiting to be served at the counter." Petitioners' Appendix, p. 3a. "They did not," as the Court of Appeals so stated, "approach anyone in a line." Pet. App., p. 3a.

After being warned that they would be arrested for their leafletting, on the basis of an unwritten and unpublished rule of the City of Chicago prohibiting leafletting in the public areas of the city's airports, respondents and 5 other CAMP members similarly engaged left the airport.

Respondents sought injunctive and declaratory relief to protect their First Amendment rights in the United States

District Court. The Court granted their motion for preliminary injunction. In so doing, the Court specifically found "(t)hat plaintiffs do not interfere with the functioning of O'Hare Field Airport for its use as an airport." (Respondents' Appendix, at 2a). The trial court further specifically found that "the plaintiffs do not charge for their literature and do not 'force' said literature upon the public." (Resp. App., at 2a).

The Court of Appeals left undisturbed the trial court's findings. And, as the Court stated:

> There is no question but that the terminal buildings at O'Hare Airport, city-owned and operated, are freely available to the general public and that their wide-open public areas which perhaps 90,000 transients visit daily can accommodate seven persons peacefully distributing, in groups of twos and threes, free copies of their publication to interested persons. Indeed, although airport and airline officials testified that unrestricted leafletting and solicitation could conceivably interfere with important airport operations, *the City does not contend that the activities of the plaintiffs do in fact obstruct airport traffic.* Pet. App. p. 7a (Emphasis added).

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONERS PRESENT FOR REVIEW ISSUES NOT PRESENTED BY THIS CASE.

Petitioners, by their posing of the Question Presented, seek to bring before this Court issues which in fact simply are not present.

Contrary to petitioners' broad delineation of the question, and their arguments of terribles, the ruling of the Court of Appeals in no way erects a total bar to the regulation of leafletting and soliciting within the terminal buildings of the city-owned airport. Indeed, the Court explicitly vouchsafed such a ban and carefully limited its ruling to the facts before it, leaving open the possibility of future regulations:

> We conclude that the district court did not err in enjoining the defendants from obstructing the plaintiffs from leafletting in the terminal buildings of O'Hare Airport. At the same time, we recognize, as the district court did when it excluded the "fingers" leading to the arrival and departure gates from its injunction, that the Constitution does not prohibit all regulation of leafletting in publicly owned facilities. . . . Thus regulations prohibiting leafletting might validly be extended from the passageways leading to the arrival and departure gates to include also leafletting at check-in counters, for example, if it should appear that such activities substantially interfere with rapid and efficient airport operations. However, it does not appear from the present record that the plaintiffs' leafletting took place at check-in counters or with people waiting at them to be checked in or that the plaintiffs intend in the future to carry on their activities at such places. It will be time enough, therefore, to consider enlarging the present exception to the general scope of the injunction in question if and when

the City promulgates a suitable restrictive regulation and makes the requisite showing to the district court of the need for it. Pet. App. pp. 8a-9a.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH WELL-ESTABLISHED CASE LAW, INCLUDING DECISIONS OF THIS COURT.

1. THERE CAN BE NO QUESTION THAT THE TERMINAL BUILDINGS AT O'HARE AIRPORT CONSTITUTE A PUBLIC FORUM.

The description provided by the Court of Appeals at O'Hare Airport is an accurate one and relevant to the determination that the terminal buildings at O'Hare Airport indeed constitute a public forum. The Court stated:

> O'Hare Airport, located within the limits of the City of Chicago, is owned by the City and administered by the City's Department of Aviation. It is a two-or-three minute drive from the nearest residential area, a thirty-minute drive from the Chicago downtown area with which it is connected by major expressways and is served by bus lines and taxicabs. Private automobiles are accommodated in massive public parking lots. Leased space in the airport terminal buildings houses numerous concessionares including restaurants and shops of every description. Seventy-two departure gates handle more than 100 flights per hour during peak periods. Approximately 20,000 persons are employed at the airport and a total of 100,000,000 passengers, persons accompanying them, and employees, use the facility each year. Pet.App., p. 3a.

It is relevant, also, in the context of this case, to point out that the district court specifically found "that large numbers of persons in the military service use the facilities at O'Hare Field Airport; many of whom never leave the terminal buildings." (Resp. App., at p. 2a).

Given these findings and the nature of the terminal buildings, nothing could be more correct than the conclusions of the two lower courts that plaintiffs were exercising First Amendment rights in a preeminently public place. Indeed, given the 100,000,000 people passing through this forum, and the nature of the activities conducted therein, the O'Hare Airport terminal buildings are at the least equally as public a forum as the State Capitol held to be a public forum in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), and the public library held to be a proper forum for a vigil in *Brown* v. *Louisiana*, 383 U.S. 131 (1966). Fully consistent with this conclusion are numerous other rulings: *Kuszynski* v. *Oakland*, 479 F.2d 1130 (9th Cir. 1973) (use of city airport for leafletting and picketing); *Women Strike for Peace* v. *Morton*, 472 F.2d 1273 (C.A.D.C.) 1972) (use of the Ellipse, a public park in Washington, D.C., for an anti-war display); *Wolin* v. *Port Authority of New York*, 392 F.2d 83 (2d Cir. 1968), cert. denied 393 U.S. 940 (use of bus terminal for leafletting); *Reilly* v. *Noel*, 384 F.Supp. 741 (D.R.I. 1974) (use of State House rotunda for prayer services); *Unemployed Workers Union* v. *Hackett*, 332 F.Supp. 1372 (D.R.I. 1971) (use of waiting room of Department of Employment Security for leafletting.)

2. PETITIONERS' RELIANCE ON THIS COURT'S RULING IN LEHMAN v. CITY OF SHAKER HEIGHTS IS COMPLETELY MISPLACED.

Petitioners almost completely rely upon *Lehman* v. *City of Shaker Heights*, 94 S.Ct. 2714 (1974), as basis for their petition. The striking dissimilarity of facts makes that reliance totally meritless. The issue in *Lehman* was whether publicly owned buses which had never before held themselves out as public fora were indeed such.

Not at issue was the use of the central loading and discharge depot of the bus company—indeed, the Court's opinion is devoid of any reference to any such structure even existing.

Here, the lower courts were not addressing, nor were the respondents using—or even seeking to use, the airplanes landing and departing from O'Hare Airport. They were not even using the "fingers" leading to the planes. And indeed, the trial court specifically exempted from its injunction order these "fingers", an exemption which the Court of Appeals noted approvingly. Pet. App., p. 9a.

Thus, on the one hand, in *Lehman*, this Court was dealing with enclosed vehicles—buses, carrying a limited number of persons and devoted to a very limited and specific use, e.g., transportation from one point to another. And on the other hand, in this case, the courts were dealing with massive structures, through which 100,000,000 people pass annually, in which numerous businesses operate, in which magazines, newspapers, and the numerous shops' articles are held out for sale. Mere recitation of the factual disparities virtually compels the logical conclusion that *Lehman* is simply irrelevant.

Petitioners vainly parade arguments of terribles to try to obscure the fundamental difference between an airport terminal and a bus. Thus, they raise the spectre of the "entire operation of O'Hare" being affected (Pet. Brief, at 10), and of "all persons" being "free to enter the terminal buildings . . . and thrust themselves or their ideologies upon" passengers. *Ibid.* Thus, "airport operations might be seriously disrupted." *Ibid.*

Petitioners apparently are unable to read the clear finding of fact made by the trial court that respondents

did not "interfere with the functioning of O'Hare Field Airport." They apparently are unable to read the very carefully constructed ruling of the Court of Appeals, which invited narrowly drawn regulation. Rather, seeking to ignore the virtually black letter law enabling them to regulate as to time, place, and manner[1], they will settle for nothing less than a total ban on First Amendment rights—a ban which the lower courts here of course could not countenance.

Petitioners' second argument, relying on Mr. Justice Douglas' concurring opinion in *Lehman*, supra, and invoking right to privacy which protects a captive audience from having unwelcome views thrust upon it, is equally inapposite. It is fundamental that First Amendment right are preeminent. If they are to be sacrificed, only the most careful balancing of interests can be employed—a balancing which must, given the nature of the public arena here and the correlative minimal expectation of privacy of the arena's users, come out on the side of free speech. As Mr. Justice Roberts said in *Schneider* v. *State*, 308 U.S. 147, 161 (1939):

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. In every case, therefore, where legislative abridgment of the right is asserted, the court should be astute to examine the effect of the chal-

[1] See, e.g., *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cox* v. *State of New Hampshire*, 312 U.S. 569 (1941); *Lovell* v. *Griffin*, 303 U.S. 444 (1938); Kalven, "The Concept of a Public Forum: Cox v. Louisiana", 1965 *Supreme Court Review* 1.

> lenged legislation. Mere legislative preference or beliefs respecting matter of public convenience may well support regulation directed at other personal activities but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Thus, in *Martin* v. *Struthers,* 319 U.S. 141 (1943), the right to privacy of homeowners in keeping their places of residence free from the doorbell ringing of religious zealots was found to be deserving of lesser protection than the rights of Jehovah's Witnesses to proselytize for their religion. Similarly, the interest of homeowners in being protected from residential picketing, when placed on the scale opposite competing First Amendment activities, was found wanting in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). And prohibition on the use of loudspeakers in public places for the dissemination of public and political issues was found violative of First Amendment rights, though such noise certainly constitutes an invasion of privacy of the citizen subjected to such noises. *Saia* v. *State of New York,* 334 U.S. 358 (1948).

CONCLUSION

The record of the case below and the arguments made by Petitioners are devoid of any novel issue of constitutional law, as yet unsettled, which could claim this Court's time and consideration. The criteria establishing the character of a public place as a public forum are clear and met by the facts in this case.

Similarly clear and unequivocal are the legally permissible restrictions which a governmental body can put on the use of such public forums when used for protected First Amendment activities. These restrictions were recognized by the Court of Appeals, which invited Petitioners to enact suitable regulations: an invitation Petitioners have chosen to ignore.

Thus, Respondents pray this Court to deny Petitioners' Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

CHICAGO, AREA MILITARY PROJECT, a voluntary organization; et al.,

Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation; et al.,

Defendants.

No. 73 C 758

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiffs filed their complaint for injunctive, declaratory and pecuniary relief on March 26, 1973 and their amended complaint on May 21, 1973.

2. The plaintiffs sought to enjoin the defendants from preventing plaintiffs and each of them from leafletting or distributing literature within the terminal buildings at O'Hare Field Airport, a public facility owned by the City of Chicago, and to prevent defendants from arresting, harassing, intimidating or otherwise obstructing the plaintiffs in pursuit of activity protected by the First and Fourteenth Amendments to the United States Constitution.

3. That the plaintiff unincorporated association among other things publishes a monthly newspaper called CAMP NEWS which is primarily directed to members of the armed services and which carries news of the "G.I." Movement and other news of general legal and political import.

4. That the individual plaintiffs and others sought to distribute said CAMP NEWS and other literature on March 11, 1973 and March 18, 1973 within the O'Hare Field Terminals and were prevented from doing so by the defendants, their agents, employees and/or servants thus causing irreparable harm to the plaintiffs.

5. That large numbers of persons in the military service use the facilities at O'Hare Field Airport; many of whom never leave the terminal buildings but change flights for other locations.

6. That the defendants have no objection to plaintiffs or others distributing literature on the sidewalks outside the terminal buildings.

7. That newspapers, magazines and other literature are readily available for sale at concession stands as well as in machines in the terminal buildings, i.e. The Chicago Tribune.

8. That the plaintiffs do not charge for their literature and do not "force" said literature upon the public.

9. That plaintiffs do not interfere with the functioning of O'Hare Field Airport for its use as an airport.

CONCLUSIONS OF LAW

THE COURT FINDS:

1. that the defendants are required by law (Municipal Code of Chicago §§25-27) to promulgate written rules, regulations or laws to codify and publicize administrative policy for O'Hare Field Airport.

2. that no lawful rule, regulation or law exists preventing the plaintiffs or others from leafletting, distributing or otherwise making available literature they seek to distribute at O'Hare Field Airport and defendants conduct is in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. that the plaintiffs and each of them were engaged in activity protected by the First and Fourteenth Amendments to the United States Constitution and said conduct of the defendants, their agents, employees and/or servants constitutes prior restraint on such activity and was unlawful.

4. that the plaintiffs will suffer immediate and irreparable harm in that the O'Hare Field Airport Terminals are the most effective and efficient forum for plaintiffs to distribute literature especially since their focus is military personnel.

THE COURT ORDERS THAT:

the defendants, their agents, employees and/or servants are hereby restrained and enjoined from arresting, harassing, intimidating or otherwise obstructing plaintiffs engaged in leafletting or otherwise distributing CAMP NEWS or other literature within the terminal buildings (not to include the "fingers" leading to the arrival and departure gates) of O'Hare Field Airport.

ENTER:

/s/ Richard B. Austin
United States District Judge

DATED: April 1, 1974